

C. Placement of Noncommercial Stations on PEG Channels

Cable systems required to carry additional noncommercial educational signals under Section 5 may, with the approval of the franchising authority, place the additional signals on the public educational or governmental channels (PEG channels) not in use for their designated purposes. The Notice asks what procedures should be followed if a PEG channel is used for a noncommercial signal and thereafter a qualified PEG user materializes and no other channel capacity exists. Notice at ¶ 14.

The answer appears to be that, unless the franchise authority otherwise agrees, the cable system must displace another programming service, either a non-must carry broadcast station or cable programming service, and continue to carry the noncommercial station. There appears to be little question but that the Commission cannot countermand the determination of the franchise authority to "reclaim" the PEG channel. Both the language of the Act and the legislative history make it clear not only that the PEG channels can be used initially for carriage of noncommercial signals under Section 5 only with the approval of the franchising authority, Section 5(d), House Report at 100; Senate Report at 88, but that Section 5(d) was not intended to impair the right of the franchising authority to regulate the use of unused PEG capacity under Section 611 of the Communications Act, including specifically the prescribing of rules "under which

such permitted use shall cease." 49 U.S.C. § 611(d). See House Report at 100.

Nor does the Cable Act provide any exemption, express or implied, from the must carry obligations for noncommercial stations previously carried on now-unavailable PEG channels. Thus, if the franchising authority exercises this right (for no reason or to make room for a qualified PEG user), the cable system will have no alternative but to continue to carry any qualified local noncommercial educational station even if that means displacing another service. See Sections 5(b)(2)(A), (3)(A) and (e).^{17/}

D. Identification of Signals Carried in Compliance with the Act

Section 5(k) requires a cable operator, upon request by any person, to identify the noncommercial educational signals carried on its systems pursuant to the carriage requirements of Section 5. The Notice asks whether it should

^{17/} How the change is physically implemented will, of course, depend on the technical capabilities of the particular cable system as well as the terms of the franchise agreement. For more advanced systems, the change may involve nothing more than the redesignation of another channel as the PEG channel. For more primitive systems which must cluster channels by program type, the change may require actually transferring the noncommercial must carry station to another channel. In those instances, the must carry station should be afforded its full rights under the Act to an appropriate channel position.

The Commission should also make it clear that where a cable system has both the technical capability and the franchise agreement latitude to designate any channel on its system as a "PEG" channel, it may not use that discretion to evade the channel positioning requirements of the Act.

establish notification procedures, including requirements for written notification, the timing of the notification and the filing of the notification in the public file. Notice at ¶ 14.

APTS strongly urges the Commission to establish a clear, mandatory and unequivocal procedure for cable systems to follow in fulfilling their notification obligations under Section 5(k). This notification is absolutely vital to assure that stations obtain information otherwise solely within the purview of the cable operators which is essential to their determinations as to whether they are qualified for carriage under the terms of the Act. As argued above, if properly implemented, notification will not only further Congress' intent that stations entitled to carriage are in fact carried expeditiously, it will minimize the potential for dispute and reduce the volume of complaints of noncompliance to the Commission.

APTS suggests that the Commission adopt the following or similar procedures:

- . Any person, including noncommercial television stations, may request of a cable system, in writing, a list of signals carried by the system in compliance with Section 5.
- . Within 10 days of receipt of a written request, the cable operator must respond, in writing to such a request. In addition to identifying those signals carried in compliance with the Act, the operator should identify any additional signals it plans to begin carrying (within 60 days of the response) in compliance with the Act.

- . The cable operator shall be required to file a list of signals carried in compliance with Section 5 within 30 days of the Commission's Report and Order in its public file, and to update that list within 30 days of any changes.
- . The cable operator shall be required to provide this updated list (at least on a quarterly basis) to all stations that have requested notification.

These procedures would insure that stations have the information they need to exercise their rights for carriage under Section 5 without placing an undue burden on the cable operators.^{18/}

III. TECHNICAL ASPECTS OF SIGNAL CARRIAGE

A. Vertical Blanking Interval and Subcarrier Carriage Requirements

Section 5(g) requires the cable operator to retransmit in its entirety the primary video, accompanying audio and line 21 closed caption transmission of each noncommercial signal carried. In addition, cable systems are required to retransmit "to the extent technically feasible" program-related material carried in the vertical blanking interval (VBI) or on subcarriers "that may be necessary for receipt of programming by handicapped persons or for

^{18/} The Commission also asked for comment on Section 5(c) (the grandfather provision for all qualified local noncommercial educational stations carried as of March 29, 1990) 5(f) (the restriction on stations exerting network nonduplication rights) and 5(h) (the basic tier carriage requirement). Except for Section 5(h), which is discussed in Part IV.B. below, APTS believes that these statutory provisions are clear on their face and need no implementing rules promulgated by the Commission.

educational or language purposes." The retransmission of other material in the vertical blanking interval or on subcarriers is within the discretion of the cable operator. Section 5(g). The Notice seeks general comment on the implementation of this requirement. It specifically asks when carriage of information in the vertical blanking interval or on subcarriers is "technically feasible." Notice at ¶ 32.

As recognized by both the Senate and the House Reports, public television stations have pioneered the use of broadcast spectrum to deliver closed-captioning, descriptive video and other important program-related services to meet the special needs of vision-impaired, hearing-impaired, and non-English speaking viewers.^{19/} In addition, public television uses the VBI to deliver lessons plans and other support material to accompany the educational programming delivered to the nation's schools.

Congress expressed the clear intent that "[m]inority and physically challenged viewers should not lose these valuable services simply because they rely on cable to gain access to public television programming." House

^{19/} House Report at 101; Senate Report at 89. For example, public television serves the visually-impaired viewer by using a channel in the aural subcarrier to provide a Descriptive Video Service, which narrates the key visual elements of the programming. Public television serves the non-English speaking audience by using a channel in the aural subcarrier to simulcast selected programs in a second language. The closed captioning transmitted on line 21 for the hearing impaired viewer also assists the non-English viewer to learn to read the English language.

Report at 101. The Commission should be guided by this clear intent in any rules or interpretations it may adopt to implement Section 5(g).

APTS suggests the following guidelines, derived from the statute, as well as the legislative history, for implementing Section 5(g). First, the Commission should make clear that cable systems are required to carry the primary audio, video and line 21 closed captioned transmissions in their entirety without exception. Cable systems cannot raise technical limitations for non-carriage of such transmissions.

With regard to the requirement that cable systems carry program-related material necessary for the receipt of programming by the handicapped or for educational or language purposes "to the extent technically feasible," the Commission should recognize the following definitions derived from the legislative history. Program-related material is material that is integrally as opposed to tangentially-related to the primary programming. It includes, but is not limited to, subtitles for hearing-impaired and translations of the program into another language. See House Report at 101. Material that is necessary for the receipt of programming by handicapped persons includes, but is not limited to, closed captioning, descriptive video services, and subtitles. Id. Material that is necessary for the receipt of programming for educational or language purposes includes, but is not limited to, translations of programs into second languages and data or

information (such as lesson plans or scheduling notices) that accompanies and assists educators to use educational programming delivered to schools. Id.

The Commission should construe the language "to the extent technically feasible" narrowly to further Congress' intent in Section 5(g)(1) that cable viewers have the greatest possible access to valuable handicapped, educational and language services carried on the VBI or subcarriers. The House Report again provides some guidance. If the transmission of these special services on the VBI or subcarrier requires a cable system to retrofit its system or modify its facilities, it would be considered technically infeasible. House Report at 101. Alternatively, if a cable system must merely discontinue other uses of the VBI or relevant subcarrier to transmit handicapped, educational or foreign language material, the transmission of such material would be considered technically feasible. Id.

It is APTS' understanding that virtually all cable systems today have the capability of retransmitting virtually any type of encoded transmission on the VBI and all subcarriers of broadcast channels. Claims of technical infeasibility should be quite rare (and greeted with great skepticism). To assist with the monitoring and enforcement of this requirement, cable systems should be required to include in their Section 5(k) notification statement (1) a certification that they are also carrying all statutorily

required information on the VBIs and other subcarriers of those stations; or (2) a statement describing information stripped or otherwise not carried on the VBI's and subcarriers of those stations. If a system acknowledges stripping or otherwise failing to carry any such information, it should be required to provide a specific statement describing its technical facilities and the precise technical reasons rendering such carriage infeasible. Stations given this information should then be given an opportunity to challenge the system's action through the same complaint procedure employed for carriage disputes.

Cable systems that are capable of carrying such information should not be permitted to render such carriage infeasible because of future changes in their physical plant, such as the adoption of digital channel compression transmission technologies. While it may be that such transmission systems technically will not have VBIs or subcarriers as such, they can be developed to accommodate the additional information contained in those portions of the signals. Both cable operators and system developers should be placed on notice now that these extremely important statutory carriage obligations cannot be circumvented in this fashion.

B. Signal Quality

Pursuant to Section 5(g)(2), cable operators must carry noncommercial signals with bandwidth and technical capacity equivalent to that provided to commercial television stations carried by the cable system. Furthermore, they must carry the signals "without material degradation." The FCC is directed to adopt any carriage standards that are needed to ensure, to the extent technically feasible, that cable operators afford broadcast signals the same quality of signal processing and carriage as they employ for any other type of programming carried on the system. See Section 4(b)(4)(A); Senate Report at 89.

The Notice asks whether the technical standards recently adopted in its Cable Technical Report and Order satisfy the requirements of Section 5(g)(2) of the Cable Act. The Notice tentatively submits that these technical standards will ensure that no material degradation occurs on any video signal delivered to a subscriber. Notice at ¶ 35.

The Notice also notes that cable operators may, where appropriate and feasible, delete signal enhancements, such as ghost-cancelling, from the signal of a commercial station and employ such enhancements at the system headend (Section 4(b)(3)(A)). The Notice asks whether it should presume that cable systems may likewise delete signal enhancements for noncommercial stations, even though Section 5 does not expressly address the question. Notice at ¶ 32.

APTS is concerned about the proposal to permit a cable operator to strip ghost-cancelling signals from noncommercial broadcast signals and incorporate such enhancements at the system headend, even if system discretion is limited, as it should be, to instances where headend implementation will in fact improve the quality of the broadcast transmissions. The Commission has just proposed to adopt a broadcast ghost-cancelling system with a reference signal to be carried on Line 19 of the VBI. Notice of Proposed Rulemaking in MM Docket No. 92-305, adopted December 28, 1992, FCC Report No. DC-2298. The Commission must take great care to ensure that any discretion granted to cable systems to strip off Line 19 information does not undercut the potential benefits of adopting a universal ghost cancelling system, particularly by reducing the incentives of receiver manufacturers to install Line 19 decoding equipment in new receivers. The Commission should also make it clear that should cable operators strip Line 19 for the purpose of transmitting other information, they must do so in a way that does not falsely activate the Line 19 decoders or otherwise act to impair the primary video signal.

APTS believes that the Commission has the authority to bar cable systems from stripping ghost-cancelling signals from noncommercial signals. The statute does not contain any express grant of authority to strip ghost cancelling for noncommercial stations and, given the rather clear program-

related content of such signals, arguably bars any such action.

In any event, the legislative history indicates that Congress intended that the cable systems be permitted to strip and replace ghost-cancelling signals only where doing so would facilitate the delivery of broadcast programming to the cable subscriber. See House Report at 93. The Commission should carefully consider whether permitting substitution of alternative ghost-cancelling techniques for any type of broadcast station will be counterproductive. Moreover, even if it decides initially to permit such actions with respect to some, e.g., commercial stations, the Commission should revisit the issue within a certain period of time to ascertain whether such actions have in fact impeded ghost-cancelling penetration.

IV. CHANNEL POSITIONING

A. RESOLUTION OF DISPUTES OVER DESIRED CHANNEL POSITIONS

Pursuant to Section 5(g)(5), a cable operator is required to carry a noncommercial educational station on its on-air channel or on the channel on which it was carried on July 19, 1985 at the election of the station. Alternatively, the station can be carried on any other channel mutually agreed to by the station and cable operator. Any disputes regarding channel positioning shall be resolved by the Commission.

Because of the increasingly frequent channel shifting of broadcast stations engaged in by cable systems in recent years, the possibility arises that there may be more than one valid claim to the same channel. The Notice asks whether it should adopt a formal priority structure for resolving such disputes. The Notice specifically asks what consideration should be given to assigning a uniform channel number to a station throughout its service area; and whether cable operators should be permitted to resolve the channel placement issue, "within the constraints otherwise established to minimize disruption to the consumers." Notice at ¶ 33.

APTS believes that it would be unwise at this juncture to adopt a formal priority structure premised on the statutory criteria. Based on a survey of APTS members, at least among noncommercial stations, there does not appear to be any clear preference for either the July, 1985 channel position or their over-the-air channel number. As the Act contemplates, there appears to be the potential for fruitful negotiation for channel positioning among broadcasters and cable operators and it is conceivable that a formal priority structure, which predetermines the outcome, will in many instances remove the incentive needed to bring all of the relevant parties to participate in such a negotiation.

APTS suggests that in lieu of establishing a formal priority structure, the Commission should consider a range of factors to assist it in resolving channel positioning

disputes. Substantial consideration should properly be given to a station's desire, as evidenced by its investment, to obtain a uniform channel position throughout its service area. This factor is very important to public broadcasters who are disproportionately on UHF channels, and thus have historically been displaced more frequently to be put on basic tiers, and who face unusual difficulties of promoting their station on a variety of different cable channels.^{20/} It would also be appropriate for the Commission to take into account the extent to which the channel choice will affect audience access to noncommercial service and signal quality (where the options would result in differences in signal quality).

Under no circumstances, however, should the cable operator be permitted unilateral discretion to select channel position for one or more noncommercial stations. This would directly contradict Congress' intent that the broadcaster be given the opportunity to select a channel position, and that the Commission, not the cable operator, is the appropriate entity to resolve disputes.

B. Relationship Between Channel Positioning and the Basic Tier Requirements

The Notice also questions the relationship between the channel positioning provisions in Section 5(g)(5) and the obligation of the cable operator to create a basic tier

^{20/} As noted earlier, public television stations are carried on dozens of different cable systems.

containing, at a minimum, all stations carried under the must carry provisions of the Act. See Section 623(b)(7). The Notice assumes "that Congress intended that stations be entitled to their over-the-air channel position only when that channel is encompassed by the basic service tier on the system." Notice at ¶ 33.

It is clear that Congress intended that noncommercial educational stations, carried pursuant to the must carry provisions of the Act, be carried in the cable system's basic service tier.^{21/} It is also clear that Congress afforded both the commercial and noncommercial broadcasters the right to choose, within specified constraints, their desired channel positions. Congress did not address, either in the statute or in the legislative history, the potential for conflict between the basic tier and the channel positioning provisions or how to reconcile that conflict.

The conflict which arises between these two provisions appears to result solely from the varying technical limitations in cable systems. Generally, newer, larger cable

^{21/} Pursuant to Section 3, the basic service tier must include, among other things, all signals carried in fulfillment of Sections 4 and 5 of the Act. Section 623(b)(7). This requirement is reiterated in the noncommercial must carry provisions of the Act. Section 5(h) provides that signals carried under Section 5 "shall be available to every subscriber as part of the cable system's lowest priced service tier that includes the retransmission of local noncommercial television broadcast signals."

systems have both greater numbers of channels on the system and imbedded signals that can authorize the subscriber to use any combination of channels on the system, within the limits of the system's capacity. These systems have the capability of compiling a basic tier from any channels on the system regardless of their location on the band. In contrast, the older cable systems have fewer available channels and less sophisticated authorization methods. Typically these systems must install filters at the subscriber's location to block out unauthorized signals. These systems must form their basic tiers from clustered channel numbers.

For cable systems with imbedded authorization capacity and large channel capacity, there is little or no conflict between the basic tier and channel positioning provisions of the Act. These systems can incorporate virtually any channel into the basic tier regardless of the channel location. Where it is technically feasible to do so, these systems should be required to honor the channel positions selected by noncommercial stations under section 5(g)(5) and place those stations on the basic service tier of the system.

For cable systems that must, because of technical limitations, identify a clustered basic service tier that does not encompass a station's desired channel position under Section 5(g)(5), APTS believes that the strong public policy favoring universal access to the noncommercial signals

reflected in the Act requires that the noncommercial station be carried on the system's basic tier. Moreover, if and when the system increases channel capacity and its ability to utilize all of its channels in authorizing basic tier, the noncommercial station should retain the option to not be displaced from the channel upon which it is currently being carried.^{22/}

V. PROCEDURAL REQUIREMENTS

A. Notification Regarding Deletion or Repositioning of Channels

Cable operators are required to give noncommercial educational stations and all subscribers to the cable system written notice at least 30 days before deleting or repositioning the station. Section 5(g)(3).^{23/} APTS suggests that the Commission adopt the following procedures to ensure that the notice is meaningful and timely:

- . The notice to the station should state clearly the reasons for the deletion or repositioning, be sent by certified mail to ensure that it is received, and be served on the FCC
- . The notice to the station should be received by the station at least 30 days prior to any deletion or repositioning by the cable system to provide the station with the full 30 days to

^{22/} Waivers may well be warranted where an imminent technical up-grade would moot the issue and both system and station would prefer to minimize the disruption of channel relocation.

^{23/} APTS notes that the circumstances under which a cable system may legally delete or reposition a noncommercial station are strictly constrained by Section 5.

take whatever remedial action it deems necessary.

- . The notice to the subscriber may be in multiple forms as long as one form is by a separate mailing to the subscriber. This is distinguished from a multi-purpose mailing or notification by publication in a program guide or other cable system publication. This is to maximize the opportunity for the subscriber to receive an effective notice of the drop or repositioning.^{24/}

B. Remedies

Section 5(j) of the Act sets out an enforcement procedure in the event that a cable system fails to comply with its noncommercial must carry obligations. If a noncommercial station believes that a cable operator has failed to comply with the signal carriage requirements of Section 5, the station may immediately file a complaint with the Commission. The station need not notify the cable operator first. The Commission shall afford the operator the opportunity to respond to the complaint. Within 120 days after the complaint is filed, the Commission shall make

^{24/} APTS has no comment on whether cable systems should also notify their subscribers before dropping or repositioning a commercial station. The FCC notes that this requirement was not included in the commercial notification provision of the Act.

APTS believes that the provisions for compensation for carriage of a noncommercial educational station set out in Section 5(i) are clear and can be implemented by the Commission without additional explanation or comment. See Notice at ¶ 38.

findings with regard to compliance with Section 5 and issue any remedial order necessary to insure compliance.

The Notice proposes that all complaints be served on the subject cable operators who would be afforded ten days to respond in writing. The Notice also raises a number of issues regarding implementation of the enforcement procedure. APTS suggests that the Commission specify procedures for filing complaints under Section 5(j) to ensure timely and fair resolutions of any such complaints. APTS recommends the following procedures:

- . Complaints under Section 5(j) should be filed (in the form of a Petition for Declaratory Ruling) under the special relief rules contained in Section 76.7 of the Commission's rules. These rules should be flexibly applied to accommodate the procedures for filing a complaint set out in Section 5(j).
- . The Commission should find that a station can reasonably believe that a cable operator has failed to comply with the carriage requirements of Section 5, if the cable operator has not responded to a written request for carriage within 20 days from the date of the request.
- . Pursuant to the provisions of Section 76.7, stations filing complaints must serve all interested parties to the complaint. Under this provision the station must at least serve the cable operator who is the subject of the complaint.
- . Cable operators must file a response to the complaint, in writing within 30 days after the complaint is filed.^{25/} The station may file

^{25/} The Commission proposes a 10-day response time. The 30-day period proposed by the APTS is consistent with the response procedures contained in Section 76.7.

a reply within 20 days from the date of the response.

- . The Commission should clarify that noncommercial educational stations seeking relief under Section 5(j) will not be required to file fees with its complaint filed under Section 76.7. Noncommercial educational stations are generally exempt from filing fees pursuant to Section 1.1112 of the Commission's rules.

The Notice also asks whether the Commission should impose a time limit on the filing of complaints under Section 5(j). It suggests, for example, that a station be required to file within 30 or 60 days of the triggering action by the cable operator.

APTS strongly opposes the imposition of any time limit on the filing of a complaint under Section 5(j). Such a time limit contradicts the plain terms of the Act, which affords noncommercial stations with carriage and channel positioning rights that can be exercised at any time. Nothing in the Act suggests that those rights can be lost simply because a station does not chose to exercise them within a given time frame.

The imposition of a time limit for filing complaints for noncarriage would be particularly meaningless for stations that are not currently carried. For these stations, there is

no triggering act by the cable operator that even begins a station's obligation to file a complaint.

Respectfully submitted,

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